IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 269 OF 2006

Smt. Sunanda Rajendra Killedar .... Appellants
and anr.
Versus
M/s Jitendra Constructions & anr. .... Respondents

Mr. Amit Borkar for Appellants.
Mr. R.V. Govilkar i/b Mrs. Lata C. Wadhwani for Respondents

CORAM : D.G. KARNIK, J.

DATE : 28TH NOVEMBER 2006

P.C.

1) Heard the learned counsel for the parties. By consent the appeal is heard finally at the stage of admission.

2) This appeal is directed against the order dated 9th November 2005 passed by the learned Civil Judge, Senior Division, Pune rejecting the Appellants' application for temporary injunction.

3) The Appellant No. 1 is the mother of Appellant No. 2 who has just come up of age. The suit property, a plot of land admeasuring about 600 sq. mtrs. (6456 sq. ft.), originally belonging to husband of appellant no.1. Unfortunately he died leaving behind him appellant no. 1 as widow and appellant no. 2 his minor son. After his death the father of respondent

no. 2, who was a friend of husband of appellant no.1, started helping the family and gained their confidence. Thereafter through his son, the respondent no. 2, he agreed to develop the suit plot and in lieu thereof agreed to allot one flat of 500 sq. ft. to the appellants. According to the appellants, at the time of said agreement the value of the suit plot was nearabout Rs.20.00 Lacs but taking advantage of fiduciary position the respondents obtained from the appellants development agreement by offering one flat of 500 sq. ft. The consideration was grossly inadequate and the development agreement was obtained by practising fraud. The appellants, therefore filed the suit bearing Special Civil Suit No. 934 of 2005 against the respondents for a declaration that the development agreement and the power of attorney dated 18th December 2002 pertaining to the suit land, registered in the office of the Sub Registrar, Haveli-IV, at serial Nos. 10760/2002 and 10761/2002 respectively, were obtained by practising fraud and undue influence on the appellants and were null and void and not binding on the appellants. They also claimed injunction restraining the respondents from developing the suit property pending decision of the suit. By the order dated 9th November 2005, the application for injunction was rejected. That order is impugned in this suit.

4) During the course of argument, learned counsel

for the respondents handed a copy of development agreement dated 18th December 2002 as well as copy of power of attorney executed by the appellants. The last paragraph of the development agreement mentions that the market value of the suit plot was Rs.19,96,000/- and stamp duty was paid on that value. The cost of construction of 500 sq. ft. flat was Rs.2,50,000/-. Thus what is the clear at the first glance of the development agreement is that the value of the plot Rs.19,96,000/- and the same was given to the respondents for consideration of Rs.2,50,000/-. Ex-facie the consideration is grossly inadequate.

5) The Respondent no. 2 is the proprietor/partner of respondent no.1. It is not disputed that father of respondent no. 2 was the friend of the husband of the appellant no. 1. It is also not disputed that he was helping the family after death of the husband of appellant no.1. On account of said friendship and on account of the help, he was in possession to dominate the will of the appellants as he held fiduciary position qua the appellants. This fact coupled with grossly inadequate consideration. Prima facie shows that the suit agreement was obtained by undue influence.

6) Learned counsel for the appellants relied upon the decision of Supreme Court in Krishna Mohan Kul Alias Nani Charan Kul and Another Vs. Pratima Maity

and others reported in (2004) 9 SCC 468. Therein the Supreme Court has observed that a person standing a fiduciary in relation to another has a duty to protect the interest given to his care and the court watches with jealousy all transactions between such persons so that the protector may not use his influence or the confidence to his advantage. When the party complaining shows such relation, the law presumes everything against the transaction and the onus is cast upon the person holding the position of confidence or trust to show that the transaction is perfectly fair and reasonable, that no advantage has been taken of his position.

7) In the present case, the father of respondent no.2 held fiduciary position. The transaction between them is not shown to be fair. The consideration, ex facie, is grossly inadequate. In the circumstances, the trial court ought to have granted the injunction.

8) Learned counsel for the respondents submitted that the injunction claimed was to restrain the appellants for entering upon the suit property, but the relief has become infructuous. He submitted that a multistoried building has already been constructed on the suit property. He therefore submitted that the injunction cannot and should not be granted. It is settled principle of law that court can mould the relief taking into consideration the subsequent events.

In my view this is the fit case to take note of the subsequent events and mould the relief. By order dated 18th April 2006, this Court (Coram : A.M. Khanwilkar, J.) while issuing notice to the respondent No.1 has directed the parties to maintain status quo and not to create third party interests in the suit property. By further order dated 13th June 2006, this Court (Coram: A.M. Khanwilkar, J.) directed the parties to maintain the status quo. In the circumstances, it will be appropriate to restrain the respondents from selling, transferring, alienating and parting with the possession of any of the flats and from receiving any consideration for the flats already agreed to be sold till the disposal of the suit.

9) Hence, I pass following order :

. Appeal is allowed. The impugned order is set aside. The respondents are restrained from selling, transferring, alienating, parting with the possession of any of the flats till the disposal of the suit. The respondents are further restrained from receiving any consideration in respect of the flats already agreed to be sold. Trial Court is directed to expedite the hearing of the suit and decided it as expeditiously as possible and in any event within 2 years hereof.

(D.G.KARNIK, J.)